Dec. 6 J. Wayne

Read

1165

SUPREME COURT OF THE UNITED STATES.

No. ~~261~~. ~~127~~ 68.

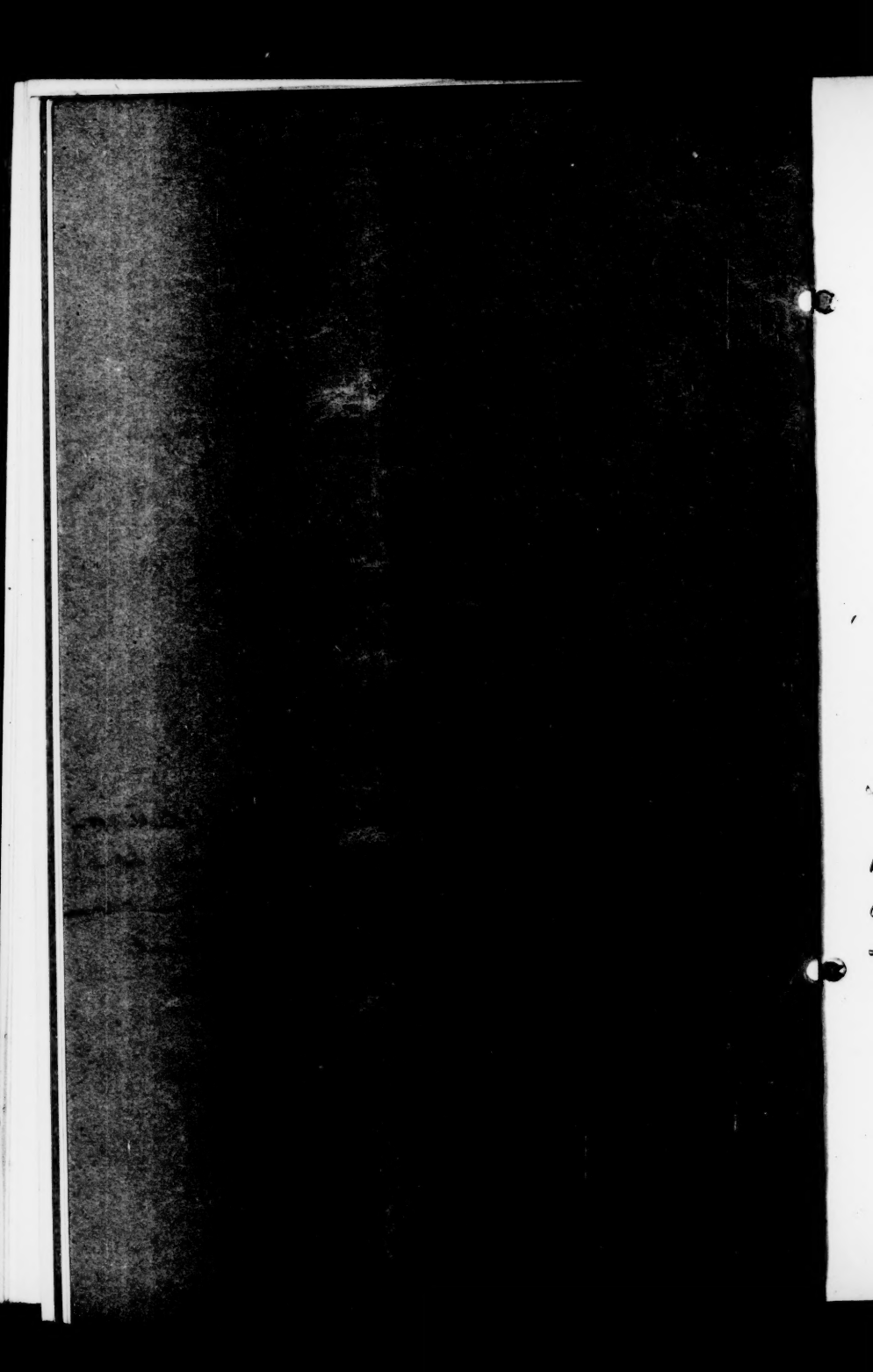
THE TERRITORY OF NEBRASKA, EX REL. ELEAZER WAKELEY, PLAINTIFF IN ERROR,

vs.

WILLIAM F. LOCKWOOD.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEBRASKA.

GOVERNMENT PRINTING OFFICE.



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"Writs of error & appeals from the final decisions of the said Supreme Court shall be allowed & may be taken to the Supreme Court of the U.S. in the same manner & under the same regulations as from the Circuit Court of the U.S." Laws of Neb. Ty. 1855

1163

1 THE UNITED STATES OF AMERICA,
The Territory of Nebraska, ss:

Pleas before the honorable William P. Kellogg, chief justice, and Elmer S. Dundy, associate justice, of the supreme court of the Territory of Nebraska, at the August special term, in the year of our Lord one thousand eight hundred and sixty-three, of the said court.

TERRITORY OF NEBRASKA *ex rel.* ELEAZAR WAKELEY,
plaintiff in error,
vs.
WILLIAM F. LOCKWCOD, defendant in error.

Be it remembered that on the 27th day of October, in the year of our Lord one thousand eight hundred and sixty-two, came into the supreme court of the Territory of Nebraska the said Territory of Nebraska, upon the relation of Eleazar Wakely, by James M. Woolworth, esq., its attorney in that behalf, and filed therein his certain petition in error, in the words and figures following, that is to say:

In the supreme court of the Territory of Nebraska.

2 TERRITORY OF NEBRASKA *ex rel.* ELEAZAR WAKELY,
plaintiff in error,
vs.
WILLIAM F. LOCKWOOD, defendant in error.

The said plaintiff in error complains and says that at the October term, 1861, of the district court of said Territory, an order and judgment was by said court made and entered by said court in a certain cause instituted and prosecuted therein by the plaintiff in error against the defendant in error, the proceedings in which said cause and said order and judgment are set forth in the transcript thereof hereto annexed, and that there is error in said order and judgment in this, that said court sustained the demurrer filed to the information in said cause and dismissed said information, whereas the said court ought to have overruled said demurrer and given judgment according to the prayer of this plaintiff in error.

Wherefore the plaintiff prays the judgment of this court, and that said judgment of said district court be reversed and said de-
3 murrer overruled, and judgment given according to the prayer of said information with costs.

JAMES M. WOOLWORTH,
Att'y for Pl'ff in Error.

Transcript of proceedings referred to in the foregoing petition in error.

TERRITORY OF NEBRASKA,
First judicial district, Douglas county:

Be it remembered that on the 15th day of June, A. D. 1861, the Territory of Nebraska, on the relation of Eleazar Wakely, by its attorney, James G. Chapman, district attorney for the first judicial district, came into the district court of the first judicial district within and for the county of Douglas and Territory of Nebraska, and impleaded Wm. F. Lockwood in an action in the nature of a *quo warranto*, in which said action said district attorney for the plaintiff filed his information, which is in words and figures following, to wit:

TERRITORY OF NEBRASKA, *Douglas county:*

In the district court for the said county of Douglas.

TERRITORY OF NEBRASKA, on the relation of ELEAZAR WAKELY *vs.* WILLIAM F. LOCKWOOD.	Information in the nature of a *quo warranto.*

To the district court sitting in and for the county of Douglas aforesaid:

James G. Chapman, district attorney of the first judicial district of the Territory of Nebraska, who sues for the people of the said Territory in this behalf, comes into the said district court, and on this 15th day of June, in the year of our Lord one thousand eight hundred and sixty-one, filed in the office of the clerk of said court, at the city of Omaha, in the county of Douglas aforesaid, this information, and hereby, for the said people of the Territory of Nebraska, at and upon the relation of Eleazar Wakely, of the city of Omaha, in the county of Douglas aforesaid, according to the form of the statute in such case made and provided, gives the court aforesaid to understand and be informed that William F. Lockwood, of the county of Dacotah, in the Territory of Nebraska, for the space of four days now last past, and more, hath unlawfully held and exercised, usurped, and invaded, and still doth unlawfully hold and exercise, usurp and invade, the office of associate justice of the supreme court for the Territory of Nebraska, without any legal appointment, election, warrant, authority, or right whatsoever therefore, to wit: at the city of Omaha, in the county of Douglas aforesaid.

And the said district attorney further gives the court to understand and be informed that on the 24th day of January, A. D. one thousand eight hundred and sixty-one, the term of office of the aforesaid Eleazar Wakely, then lately one of the associate justices of the supreme court for the Territory of Nebraska, as such associate justice had then lately expired, and it thereby became and then was competent and lawful for the President of the United States, by and with the advice and consent of the Senate of the United States, to appoint an

associate justice of the supreme court for the Territory of Nebraska; and thereupon, to wit, on the said 24th day of January, A. D. one thousand eight hundred and sixty-one, James Buchanan, President of the United States, by and with the advice and consent of the Senate of the United States, did appoint the aforesaid Eleazar Wakely to be associate justice of the supreme court for the Territory of Nebraska, for
the term of four years, from the day last aforesaid, and until
6 his successor should be appointed and qualified, which term
has not expired. And that afterwards, to wit, on the 13th day of February, A. D. one thousand eight hundred and sixty-one, at the county of Douglas aforesaid, the said Eleazar Wakely, having received a commission evidencing said appointment, and having accepted the said appointment, did take an oath before George Armstrong, probate judge of the said county of Douglas, that he, the said Eleazar Wakely, would support the Constitution of the United States, and faithfully and impartially discharge and perform the duties of the office of associate justice of the supreme court for the Territory of Nebraska, according to law and the best of his ability, the said George Armstrong, as such probate judge, then and there having full power and authority to administer said oath, which said oath was then and there endorsed and duly certified on the said commission, and afterwards, to wit, on the said 13th day of February, A. D. one thousand eight hundred and sixty-one, filed in the office of the secretary of the
Territory of Nebraska, and also transmitted to the Attorney
7 General of the United States. And by force and virtue of the
said appointment and of the taking of the oath aforesaid the said Eleazar Wakely hath ever since been and now is entitled to hold and exercise and enjoy the office aforesaid of associate justice of the supreme court for the Territory of Nebraska, and hath ever since claimed and now doth claim the same, and did enter upon and perform the duties of the said office continuously until the said time when the said William F. Lockwood unlawfully usurped, invaded, and intruded into the same. And that the said office to which the said Eleazar Wakely was appointed as aforesaid hath not, since such appointment, in any manner whatsoever become vacant. Yet the said office to which the said Eleazar Wakely was appointed as aforesaid the said William F. Lockwood hath, during the said space of four days now last past, and more, usurped, invaded, intruded into and unlawfully held, used, and exercised, and during all that space unlawfully hindered, prevented, and altogether excluded the said Eleazar
Wakely from the rightful use, exercise, and enjoyment there-
8 of, to wit, at Omaha, in the county of Douglas aforesaid, and
still doth usurp, invade, intrude into and unlawfully hold, use, and exercise, to wit, at Omaha, in the county of Douglas aforesaid, in contempt of the people of the Territory of Nebraska, and to their great damage and prejudice, and to the injury of the said Eleazar Wakely.

Whereupon, the said district attorney prays the advice of the court in the premises, and for due process of law against the said William F. Lockwood, to answer the said people by what warrant he claims

to have held, use, exercise, and enjoy the aforesaid office. And also that it may be ordered, adjudged, and determined, that the said Eleazar Wakely is entitled to rightfully hold, use, exercise, and enjoy the aforesaid office, and that the said William F. Lockwood be ousted and altogether excluded therefrom.

JAMES G. CHAPMAN,
District Attorney of the first judicial district of Nebraska Territory.

TERRITORY OF NEBRASKA, *Douglas County, ss:*

9 The within named relator, Eleazar Wakely, being duly sworn, says that the facts stated in the foregoing information are within his knowledge, and are true, as he verily believes.

ELEAZAR WAKELY.

I certify that this affidavit was sworn to before me this 15th day of June, A. D. 1851, and signed in my presence.

[SEAL.] E. B. CHANDLER, *Clerk.*

James G. Chapman, district attorney of the first judicial district of the Nebraska Territory: I hereby apply to you to file the foregoing information. Dated June 15th, A. D. 1861.

ELEAZAR WAKELY.

Filed June 15th, 1861.

E. B. CHANDLER, *Clerk.*

And thereupon, afterwards, to wit, on the 15th day of July, A. D. 1861, a demurrer was filed in the above entitled cause in the said district court, by William F. Sapp, esq., attorney for said defendant, which was in the words and figures following, to wit:

In the district court for the county of Douglas.

TERRITORY OF NEBRASKA, *County of Douglas:*

10 TERRITORY OF NEBRASKA, on the relation of ELEAZAR WAKELY,
vs.
WILLIAM F. LOCKWOOD.

And now comes the said William F. Lockwood, defendant in this suit, by W. F. Sapp, his attorney, and defends, and says that the said information and the matters therein contained are not sufficient in law for the said relator to have or maintain his said action against the said defendant, and that he, the said def't, is not bound by law to answer the same, and this he is ready to verify.

Whereupon, he prays judgment that the said Eleazar Wakely may be barred from having or maintaining his aforesaid action thereof against him.

WM. F. SAPP, *Att'y for Def't.*

Filed July 15, 1861.

E. B. CHANDLER, *Clerk.*

Stipulation by District Attorney.

TERRITORY OF NEBRASKA, *Douglas County:*

In district court.

11 TERRITORY OF NEBRASKA, on the relation of ELEAZAR WAKELY,
vs.
WILLIAM F. LOCKWOOD.

Now comes James G. Chapman, district attorney of the first judicial district in Nebraska Territory, and hereby stipulates and consents that the said relator, Eleazar Wakely, shall have full power and authority to prosecute the information filed in this cause to find judgment, without control or interference by or on behalf of the prosecuting attorney or district attorney, he, the said relator, to do so at his own costs and responsibility.

JAMES G. CHAPMAN,
District Attorney first judicial district, Nebraska T'y.

Dated August 24, 1861.

Filed August 24, 1861.

E. B. CHANDLER, *Clerk.*
By J. H. KELLOM, *Dep.*

And thereupon, afterwards, to wit, at the October term of said district court, first judicial district, and on the 17th day of October, A. D. 1861.

Present: The Hon. Wm. P. Kellogg, the judge presiding;
12 Thomas L. Sutton, sheriff; and J. H. Kellom, clerk.

This cause came on to be heard on demurrrr, and judgment was rendered therein by said court, and the same appears of record in the words and figures following, to wit:

TERRITORY OF NEBRASKA, on relation of ELEAZAR WAKELY,
vs.
WILLIAM F. LOCKWOOD.

The demurrer in this case having come on to be heard, was argued by counsel, and the court being fully advised in the premises, find the said demurrer well taken, and it is ordered that the same be sustained; and the plaintiff declining in open court to amend his information, it is ordered that the cause be dismissed and the defendant recover against the said relator his costs of suit to be taxed.

WM. P. KELLOGG, *Judge.*

TERRITORY OF NEBRASKA, *County of Douglas, ss:*

I, J. H. Kellom, clerk of the district court first judicial district, Territory and county aforesaid, do hereby certify that the above is a

copy of so much of the proceedings on record of the above entitled cause, and on file in this office, as I was requested to make.

[SEAL.] Witness my hand and the seal of said court, at Omaha, this 29th day of May, A. D. 1862.

J. H. KELLOM, *Clerk.*

13 And afterwards, and on 22d day of November, in the year of our Lord one thousand eight hundred and sixty-two, came into the said supreme court the said William F. Lockwood, by W. F. Sapp, his attorney, and filed therein his certain answer to said petition in error, in the words and figures following, that is to say :

THE TERRITORY OF NEBRASKA, on the relation of ELEAZAR WAKELY, *vs.* WILLIAM F. LOCKWOOD. } In error in the supreme court of Nebraska Territory.

Answer.

And the said William F. Lockwood now comes and says that there is no error either in the record and proceedings aforesaid, or in giving judgment aforesaid ; and therefore he prays that the said judgment may be affirmed, and that his costs may be adjudged to him, &c.

W. F. SAPP, *Att'y for Def't.*

And afterwards, at a special term of said supreme court, held at the capitol in the city of Omaha, on the twenty-fourth day of August, in the year of our Lord one thousand eight hundred and sixty-three.

14 Present : Honorable William P. Kellogg, chief justice; E. S. Dundy, associate justice; John R. Meredith, attorney of U. S.; Phineas W. Hitchcock, marshal of U. S.; Hiram M. Dickinson, deputy clerk.

The following among other proceedings were had :

MONDAY, *Aug.* 24, 1863.

THE TERRITORY OF NEBRASKA, *ex rel.* ELEAZAR WAKELY, Pl'ff in Error, *vs.* WILLIAM F. LOCKWOOD, Def't in Error.

This cause came on to be heard upon the petition in error, the answer thereto, and the transcript of the record of the proceedings in the district court, J. M. Woolworth, esq., appearing for the plaintiff in error, no one appearing for the defendant in error, and the court being fully advised in the premises, do find no error in said record. Wherefore it is now here by this court considered, ordered, and adjudged, that the judgment of the district court set out in said transcript be, and the same is in all respects affirmed, at the costs of the said relator, Eleazar Wakely. And it is further ordered, that this cause be remanded to the said district court to the end that this judgment may be carried into effect.

15 THE UNITED STATES OF AMERICA,
The Territory of Nebraska, ss:

I, John H. Kellom, clerk of the supreme court of the Territory of Nebraska, do hereby certify that the above and foregoing is a true and complete transcript of the papers on file and the proceedings had, and order and judgment made in said court in the above entitled cause, as appears of record in this office.

[SEAL.] Witness my hand and the seal of the said supreme court this eighth day of September, A. D. 1863.

JOHN H. KELLOM, *Clerk.*
By .H M. DICKINSON, *Deputy Clerk.*

16 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the chief justice and associate justices of the supreme court of the Territory of Nebraska, greeting :

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said supreme court of the Territory of Nebraska, before you, between the Territory of Nebraska upon the relation of Eleazar Wakely, plaintiff in error, and William F. Lockwood, defendant in error, a manifest error hath happened to the great damage of the said plaintiff in error, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done between the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness the honorable Roger B. Taney, Chief Justice of the said Supreme Court, the 28th day of August, one thousand eight
17 hundred and sixty-three, and William Thomas Carroll, clerk of the Supreme Court of the United States.

JOHN H. KELLOM,
Clerk Supreme Court.
By .H M. DICKINSON,
Deputy Clerk.

Allowed by chief justice of Nebraska.
WM. P. KELLOGG, *Chief Justice, N. T.*

Filed Aug. 28, 1863.

J. H. KELLOM, *Clerk.*
By H. M. DICKINSON,
Deputy Clerk.

The United States of America to William F. Lockwood, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error, filed in the clerk's office of the supreme court of the Territory of Nebraska, to show cause, if any there be, why a certain judgment rendered by said court in a cause lately pending therein, between the Territory of Nebraska, upon the relation of Eleazer Wakely, plaintiff in error, and William F. Lockwood, defendant in error, and against said plaintiff in error, should not be reversed or corrected, and why speedy justice should not be done in that behalf.

Witness the honorable Roger B. Taney, Chief Justice of the Supreme Court of the United States, this 14th day of November, A. D. 1863.

[SEAL.]

J. H. KELLOM,
Clerk of Supreme Court Ter. of Neb.

Approved by—

W. P. KELLOGG,
Chief Justice.

Know all men by these presents, that we, Eleazer Wakely, as principal, and James M. Woolworth, as surety, are held and firmly bound unto William F. Lockwood in the full and just sum of two hundred and fifty dollars, to be paid to the said Lockwood, his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Signed and sealed this 14th day of November, 1863.

Whereas lately at a supreme court of the Territory of Nebraska, in a suit depending in said court between the Territory of Nebraska, upon the relation of Eleazer Wakely, plaintiff in error, and William F. Lockwood, defendant in error, judgment was rendered against said plaintiff in error, and a writ of error having been obtained and filed in said court to reverse said judgment, and a citation directed to said Lockwood citing and admonishing him to be and appear before the Supreme Court of the United States on the first Monday in December, 1863: Now, the condition of the above obligation is such, that if said relator shall prosecute said writ of error to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; otherwise, to remain in full force and virtue.

ELEAZER WAKELY. [SEAL.]
JAMES M. WOOLWORTH.

Sealed and delivered in presence of—

J. H. KELLOM.

Approved by—

W. P. KELLOGG,
Chief Justice Nebraska Terr.

THE TERRITORY OF NEBRASKA, *Douglas County, ss:*

I, J. H. Kellom, clerk of the supreme court of the Territory aforesaid, do certify that the foregoing transcript is a true and faithful copy of the original bond on file in this office.

Witness my hand and official seal, at Omaha, this 1st day of De-
[SEAL.] cember, A. D. 1863.

J. H. KELLOM,
Clerk Sup. Court.

Supreme Court of the United States.

No. 137.—December Term, 1864.

THE TERRITORY OF NEBRASKA ex rel. ELEAZER WAKLEY, Pl'ffs in Error,

vs.

WM. F. LOCKWOOD.

Brief of the points made upon the record by the Defendant in Error.

1st. That the information in the nature of a *quo warranto*, on the relation of the plaintiff in error, could not be brought by the said Territory of Nebraska by its attorney, *James G. Chapman*. That said proceeding being in its nature to try and determine the authority of the respective parties to the record, to act as one of the justices of the Supreme Court of the United States for said Territory, by virtue of an appointment by the President of the United States, by and with the advice and consent of the Senate, it should have been instituted on the part of the United States by its attorney acting within and for said Territory.

2d. This record discloses the fact that an inferior and dependent authority has instituted proceedings to deter-

mine rights conferred and exercised by a superior authority. This cannot be done—it is contrary alike both to reason and precedent.

3d. It does not appear from the record, affirmatively, that the plaintiff in error, at the time of making said *relation*, was a resident of the Territory of Nebraska, nor that said *information* was brought within the county or judicial district where the defendant in error resided and exercised his judicial functions.

4th. It is not averred in the *information* that the plaintiff in error resided within the judicial district to which he had been assigned by the territorial legislature.—*See organic act of Nebraska.*

5th. It appears from this record that the plaintiff in error is not *now* "entitled to hold, exercise, and enjoy the said office of Associate Justice of the Supreme Court of the United States for Nebraska Territory;" but it doth appear that said right hath wholly ceased by reason of the expiration of his term of appointment to said office, and that therefore no judgment can be pronounced in the case, if error should be found in the record. No judgment can now be rendered in the case effecting the *status* of either of the parties.

WM. F. LOCKWOOD, *P. P.*

In the Supreme Court

OF THE UNITED STATES.

December Term, 1864.

THE TERRITORY OF NEBRASKA, *ex rel.*
ELEAZER WAKELEY,
Plaintiff in Error,

vs.

WILLIAM F. LOCKWOOD,
Defendant in Error.

Argument and Brief

FOR THE PLAINTIFF IN ERROR

J. M. WOOLWORTH,
OF COUNSEL FOR PLAINTIFF IN ERROR.

STOUT & HYER, PRINTERS, MADISON, WIS.

IN THE SUPREME COURT

OF THE

UNITED STATES.

DECEMBER TERM, A. D. 1864.

No. 137.

THE TERRITORY OF NEBRASKA, *ex rel.*
ELEAZER WAKELEY, *Plaintiff in Error,*
vs.
WILLIAM F. LOCKWOOD, *Defendant in Error.*

Brief and Points of the Plaintiff in Error.

This was an information in the nature of a *quo warranto* filed in the District Court of the Territory of Nebraska, for the county of Douglas, by the Territorial District Attorney for the First Judicial District. It was filed under chap. 28, Code of 1857, and the Act of Oct. 29, 1858, p. 232, Laws 1858.

It shows that the Defendant in Error had for the space of four days and more before the filing of the information unlawfully, without any legal appointment or right whatsoever, held, exercised, usurped and invaded, and at that time still did hold, exercise, usurp and invade, the office of Associate Justice of the Supreme Court of the Territory of Nebraska, and excluded the Relator therefrom; that the Relator had been duly appointed, confirmed, commissioned and qualified as such Associate Justice; and

held and was entitled to hold that office, when he was so excluded therefrom by the Defendant. It prays that the Defendant may answer by what warrant he claims to hold the said office, that the Relator be adjudged entitled thereto, and that the Defendant be ousted therefrom.

To this information the Defendant filed a general demurrer.

The District Court held this demurrer to be well taken, and dismissed the information with costs against the Relator.

The cause was then taken by the Plaintiff to the Supreme Court on error, and that Court affirmed the judgment of the District Court.

It is brought to this Court by writ of error to the Supreme Court of Nebraska.

FIRST POINT.

That the information states facts sufficient to constitute a cause of action seems too clear for argument.

It sets forth the right of the relator to the office, and the usurpation of it by the defendant, in the form sanctioned by the precedents, and approved in numerous cases.

Commonwealth vs. Fowler, 10 Mass., 290.
People vs. Richardson, and note thereto, 4 Cow., 100.
People vs. Van Voast, 4 Cow. 297.
People vs. Bank of Niagara, 6 Cow., 196.
Atty. Gen. ex. rel., Bashford vs. Barstow, 4 Wis., 568.
Sec. 4, p. 93, laws of Nebraska, 1857, "Informations."
People vs. Ryder, 2 Kern, 433.

SECOND POINT.

The demurrer is general, specifying no grounds of objection except that the information shows no cause of action.

This is, therefore, the only question raised by the demurrer.

Secs. 86, 87 and 88, Chap. III, Civil Code laws of 1858, p. 123.

Chap. 28, Code of 1857 entitled "Informations," was not repealed by the code of 1858. (Sec. 620 and 622 code of 1858, pp. 212, 213) but proceedings by *quo warranto* were to be "prosecuted under the code whenever applicable." (Last clause sec 620).

Sec. 4, ch. 28, code of 1857, prescribes the requisites of the information.

Sec. 6, *id* provides that the "defendant shall appear and "answer such petition in the usual way, and, issue "being joined, it shall be tried in the ordinary manner."

This does not in terms authorize a demurrer, and, it is submitted, that therefore a demurrer in this proceeding was not allowable. But, if it was, it is entirely clear that the rules applicable to it are those prescribed by secs. 86, 87 and 88, code of 1858, above cited, and that no question is raised by it except whether the information states facts sufficient to show a cause of action.

THIRD POINT.

It is difficult to anticipate what can be urged in support of the demurrer.

The district court seemed to entertain an idea that it was not competent for the Territory of Nebraska to institute this proceeding; or, in other words, for the relator to use the name of the Territory. We are not aware that any other point has been relied upon.

If this was a valid objection it was clearly the objection specified in clause 2 of sec. 86 code of 1858, "that the plaintiff has not legal capacity to sue." This appeared on

the face of the petition, and the objection not having been taken by demurrer or answer was waived. Sec. 88, code of 1858.

The same provision is contained in the present code of New York, and the construction we contend for has been sanctioned in several cases there:

Dennison vs. Dennison, 9 How., Pr. R. 246.
Bank of Lowville vs. Edwards, 11 How. Pr. R. 216.
Eldredge vs. Bell, 12 How., Pr. R. 547.
Loomis vs. Tift, 16 Barb., 541.
Zabriskie vs. Smith, 3 Kern., 322–336.
Society vs. Pawlet, 4 Pet. 480.
See also clause 4, sec. 86, above cited.

FOURTH POINT.

The information was rightly filed in the name of the Territory.

Sec. 1, chap. 28, code of 1857, of "Informations," gives the remedy against "any person unlawfully holding or ex" "ercising *any public office or franchise within this territory.*"

The act of October 9, 1858, p. 232, laws of 1858, gives the right to file an information to "any citizen of this territory (who) shall claim *any office* which is usurped," &c.

That this language embraces, by its terms, the office of a territorial judge seems so manifest and indisputable that it is difficult to argue the proposition. The judge not only holds and exercises an *office within the territory*, but the whole judicial power of the territory is vested in him and his associates. He interprets the laws made by the people; and, under and in conformity with those laws, he decides all controversies involving the lives, the liberties, and the property rights of the people.

It is utterly immaterial whether the relator or the defendant claims to hold the office by appointment of the President, by appointment of the Governor, or by election of the people. He is in each instance within the terms and spirit of the statutes.

In this case the defendant upon the record admits himself to be a mere usurper The relator shows a regular appointment by the President and confirmation by the Senate, and the exercise for several months of the office of associate justice; and that the defendant has intruded into and usurped the office without *any right whatever*. This the defendant by his demurrer admits. Shall he be heard to deny the authority of the Territory to oust him? Is it any concern of his that the relator holds his office by appointment of the President?; and is that a reason that the Territory shall not be permitted to inquire under what claim of right the office has been usurped or exercised by another? In every sense of the term an associate justice is an officer of the Territory. His functions are all performed within it and concern its people.

Territorial courts are not Federal courts, within the law of the constitution. They are not constitutional but legislative courts. They exercise the jurisdiction of circuit and district courts of the United States, not by virtue of the constitution conferring this jurisdiction on the federal courts, but by virtue of the organic acts. The judges are not United States, but territorial judges. This has long been the settled doctrine of this court.

American Ins. Co. vs. Canter, 1 Pet, 511–546
Benner vs. Porter, 9 How , 235–242.
Beatty vs. Ross, 1 Branch (Flor.) 198.

2. Congress had power to provide for this Territory a government of such form and powers as it, in its wisdom,

thought proper. It might have reserved to itself the sole legislative authority over it, or have vested it in certain officers or a council. Instances of such modes of providing "all needful rules and regulations" for the territories are familiar. It saw fit to grant the very largest powers in every one of the departments of government—the Executive, Legislative and Judicial—to officers of the Territory.

Section second of the act organizing the Territory (10. Statutes at Large, 277.) provides "that the Executive power in and over the said Territory of Nebraska, shall be vested in a Governor."

Section four provides "that the Legislative power and authority of said Territory shall be vested in a Governor and Legislative Assembly."

Section nine provides "that the Judicial power of the said Territory shall be vested in a Supreme Court, District Courts, Probate Courts and Justices of the Peace."

3. The powers thus conferred reside in the officers named, exclusively of all others. The domestic concerns of the Territory are committed to their sole care, and until Congress sees fit to repeal or modify this law, no other officers can interfere with them. The terms are necessarily exclusive. The forms of expression are identical with those of the federal constitution in corresponding provisions. Just as there can be no federal executive but the President, so there can be no territorial executive but the Governor.

4. In this organic act, every form of words is employed, not only to confer exclusive powers on the different branches of the Government, but to indicate that these powers are inherent in the territory as a political entity. The Judicial power within the territory is spoken of as the "Judicial power OF THE *Territory*;" the Legislative

power is also spoken of as the "Legislative power OF THE *said Territory*;" as if these powers belonged to the very nature of the Territory. Reference is not made here to the political dogmas discussed at the time of the passage of the Kansas-Nebraska Act, but simply to the organism which was then created by the law. We are considering not what Congress might do, not what it was wise for it to do, but simply the work which it did. And, therefore, it is immaterial that Congress may repeal the act. And it is also immaterial how these officers were to be appointed; that does not affect the status of the Territory.

5. The Territory being thus intended by Congress to be regarded as the sole and exclusive governing power within its limits, so far as its domestic affairs are concerned, all laws are enacted in its name, all judicial proceedings are conducted in its name, and all prerogative writs run and are prosecuted in its name and by its authority. The usurper of one of its offices, is an offender against its dignity; its people suffer by the act of usurpation.

6. If this proceeding cannot be prosecuted in the name of the Territory, there is no remedy. No law or authority exists for instituting a proceeding by *quo warranto*, or filing an information in the name of the United States in the case of a territorial office. And, if this could be done, it would be a mere change of form; the Relator and Defendant would be the same—the matter would be heard and determined *by the same Court*, and the result would be the same. The question does not involve the jurisdiction of the territorial courts over the controversy, as the proceedings in any possible form would be before those courts.

7. When an officer of the Territory has been regularly appointed by the President and confirmed, the United States has no further duty to perform. The Territory has

a right to have the office filled by the appointee It is, indeed, a strange position that the Territory is powerless to oust a mere usurper from it, and put the rightful incumbent in.

FIFTH POINT.

The right of the Relator to hold and continue to exercise the office is set forth, as we insist, perfectly in the information.

But it must be remembered, that the information not only shows the right of the Relator, but also that the Defendant usurps the office. Hence, if it even appeared by the pleadings, or had been determined by a judgment that the Relator had no right to the office, there would still be judgment of ouster against the Defendant, unless he should show a right to hold it.

Chap. 28, Code of 1857.
People vs. Ryder, 16 Barb, 370
People vs. Jones, 18 Wen., 603-4
Att'y General vs Barstow, 4 Wis., 568.

The information, therefore, states facts sufficient to constitute a cause of action in stating that Defendant usurps the office.

SIXTH POINT.

The amount of the salary attached to the office determines whether the case is appealable to the Supreme Court. This is $2,000 a year by the organic act.

Columbian Ins Co. vs. Wheelright, 7 Wh., 534.
United States ex rel. Crawford vs. Addison, 22 How., 174.

SEVENTH POINT.

This court renders such judgment as the court below ought to have rendered

The judgment upon a demurrer is final. The only exception to this rule is that, in some cases, where it has been interposed in good faith, and not for delay, the party may be allowed to withdraw it and plead further.

It is submitted with great confidence that this court should render or order peremptory judgment for the relator.

The demurrer is evidently frivolous and filed for delay. This it has accomplished. The term for which the relator was appointed has almost expired. The office is one of great public importance. The defendant has succeeded in keeping possession of it for nearly four years by interposing a demurrer, clearly ill-taken Public justice as well as the private rights of the relator, require that there should be no further delay. To permit it would be manifestly to protract the litigation and postpone a decision of the controversy far beyond the period when the term of the office will expire.

The court can, it is true, and must render judgment although after the term shall have expired.

People vs. Loomis, 8 Wen., 396

It is also true that the appointment by the organic act is for four years and until a successor is appointed. But it is to be presumed that an appointment will be made at the expiration of four years from the relator's appointment, which was January 26th, 1861.

In such a case as this, where the rights and interests of the people of the Territory are involved, the defendant should have set forth his title to the office, if any he claimed to have, instead of resting upon a demurrer to the informa-

tion which so plainly and undeniably shows the relator's right, and the defendant's usurpation.

Upon this record the defendant has no claims upon the liberality or indulgence of an appellate court. There is nothing to indicate that he has any valid defense. He admits himself to be a mere intruder into a high judicial office, and rests upon the pretense that no cause of action is shown by an information which sets forth the Relator's right to the office, and his unwarrantable exclusion therefrom by the defendant in as full, clear, direct and formal terms as are employed in any precedent which can be found in judicial proceedings.

Let him abide the consequences.

J. M. WOOLWORTH,
Of Counsel for the Plaintiff in Error.